Supreme Court, U.S.
FILED
JAN 14 2000
CLERK

No. 99-896

IN THE

Supreme Court of the United States

MICHAEL CRUMP,

Petitioner,

v.

BEST TEMPS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE DELAWARE SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

H. GARRETT BAKER
Counsel of Record
ELZUFON & AUSTIN, P.A.
Attorneys for Respondent
1201 N. Market Street
Suite 1401
P.O. Box 1630
Wilmington, Delaware 19899
(302) 428-3181

157317

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

BEST AVAILABLE COPY

STATEMENT PURSUANT TO RULE 29.6

The parent company of Best Temps is Career Associates, Inc. No publicly held company owns 10% or more of the stock of the Respondent.

TABLE OF CONTENTS

Page

Statement Pursuant to Rule 29.6 i

Table of Contents ii

Table of Cited Authorities iii

Statement of the Case 1

Reason for Denying the Writ 4

The Request For Writ Of Certiorari Should Be Denied As There Is No Conflict Between The State Common Law Displaced Worker Doctrine And The Americans With Disabilities Act. 4

Conclusion 9

TABLE OF CITED AUTHORITIES

Cases: *Page*

Franklin Fabricators v. Irwin, 306 A.2d 734 (Del. 1973) 5

Ham v. Chrysler Corp., 231 A.2d 258 (Del. 1967) 4

Keeler v. Metal Masters, C.A. No. 97A-06-002, (Del. Super. Dec. 31, 1997), *aff'd*, 712 A.2d 1004 (Del. 1998) 5, 6, 7

Lee v. Minneapolis Street Ry. Co., 41 N.W.2d 433 (Minn. 1950) 4

M.A. Hartnett, Inc. v. Coleman, 226 A.2d 910 (Del. 1967) 4

Schmitt v. Cecil Vault, C.A. No. 82A-NO-12, Bifferato, J. (Del. Super., Aug. 17, 1983) 7

Unora v. Glen Alden Coal Co., 104 A.2d 104 (Pa. 1954) 4

Statutes:

19 Del. C. § 2347 1

19 Del. C. § 724(e)(1) 6

Respondent, Best Temps, respectfully requests that the Court deny the Petition for Writ of Certiorari seeking review of the decision and judgment of the Supreme Court of Delaware which was issued on August 26, 1999. This decision affirmed the decision of the Superior Court of the State of Delaware in and for Kent County that was issued by the Honorable Henry duPont Ridgely on March 9, 1999. The Superior Court in turn had affirmed the decision of the Industrial Accident Board of the State of Delaware that was issued on June 25, 1998. These orders are reproduced in the Appendix to the Petition for Writ of Certiorari at Exhibits "A", "B", and "C".

STATEMENT OF THE CASE

The Petitioner, Michael Crump, ("Mr. Crump") was employed by the Respondent, Best Temps ("Best Temps") for two days, when on August 8, 1997, he slipped and fell, injuring his low back. Mr. Crump received worker's compensation from Best Temps pursuant to an agreement for compensation due, which was approved by the Industrial Accident. Thereafter, on January 15, 1998, Best Temps filed a Petition with the Industrial seeking to review the total disability agreement on the grounds that Mr. Crump's total disability had ceased, pursuant to 19 Del. C. § 2347. The basis for the position was the medical expert and opinion of Dr. Jerry Case, an orthopedic surgeon, that Mr. Crump was physically able to return to the workforce.

Mr. Crump opposed Best Temp's petition, contending that he was not medically qualified to return to the work force and/or that there were no positions in the labor market that were available to him within his medical restrictions, assuming he was found to be physically qualified to work.

Mr. Crump presented a job search to the Industrial Accident Board in support of his contention that he was unable to find work within his restrictions in the labor force. This job search ostensibly showed that Mr. Crump was unable to obtain sedentary work because of his work injury.

While it is true that the Industrial Accident Board accepted that Mr. Crump's job search had failed due to his injury, the Board's acceptance was with some reservation. Having heard Mr. Crump testify, and having questioned Mr. Crump concerning his job efforts, the Board specifically questioned "the sincerity" of those efforts. Specifically, the Board noted that Mr. Crump emphasized his labor background *over* his nine years of management experience on his resume, even though he was not physically qualified to perform labor activities. Moreover, the Board specifically questioned why Mr. Crump stressed his labor background on his resume given his testimony that he was primarily looking for management positions.

In rebuttal, the Employer presented testimony by its vocational consultant, Barbara Stevenson, that there were sedentary positions within the local labor market for which Mr. Crump was qualified. Ms. Stevenson presented a representative sample of nine such positions. Because direct contact between the vocational consultant and Mr. Crump is not permitted, Ms. Stevenson did not have first hand knowledge of the extent of Mr. Crump's congenital speech impediment. However, this impediment had never prevented Mr. Crump from obtaining and performing management work in the past. Therefore, Ms. Stevenson concluded that Mr. Crump would be capable of performing those jobs within her survey that did not require telephone communications notwithstanding this impediment.

The Board found appropriate several of the positions that Best Temps' vocational expert, Barbara Stevenson, testified were available and for which Mr. Crump was vocationally qualified in light of his work history, educational level and speech impediment. Ms. Stevenson testified that these jobs were a representative sampling of many jobs within the claimant's geographic area which were available to him within the restriction. In particular, the Board found that Mr. Crump was qualified for and able to perform the positions of security guard, surveillance operator, and management trainee. Inasmuch as these positions paid a wage in excess of the five dollars per week that Mr. Crump earned while working with the Employer, the Board granted Best Temps' petition, concluding that Mr. Crump could return to the workforce with no wage loss.

Mr. Crump appealed from this decision to the Superior Court of Delaware. Mr. Crump contended that the Board's decision was not supported by substantial competent evidence and that the displaced worker doctrine was not compatible with the Americans with Disabilities Act ("ADA") and the Delaware Handicapped Persons Employment Protection Act ("DHPEPA"). The Superior Court found no conflict between the federal and state anti-discrimination statutes and affirmed the determination of the Industrial Accident Board. A second appeal was taken to the Supreme Court that affirmed the decision of the Superior Court.

REASON FOR DENYING THE WRIT

THE REQUEST FOR WRIT OF CERTIORARI SHOULD BE DENIED AS THERE IS NO CONFLICT BETWEEN THE STATE COMMON LAW DISPLACED WORKER DOCTRINE AND THE AMERICANS WITH DISABILITIES ACT.

The courts of Delaware developed the common law displaced worker doctrine in order to ensure that, even though a claimant for worker's compensation benefits is *physically* able to work, there is a market available for the employee's services. Accordingly, under the displaced worker doctrine, consideration must be given as to whether factors such as a claimant's age, level of education, limited work experience, mental capacity or training would impede the claimant's ability to locate work within any applicable restrictions. *M.A. Hartnett, Inc. v. Coleman*, 226 A.2d 910, 913 (Del. 1967) (citing *Lee v. Minneapolis Street Ry. Co.*, 41 N.W.2d 433 (Minn. 1950)). In short, the displaced worker doctrine serves to ensure that the type of work for which the claimant is physically qualified is "within reach". *Ham v. Chrysler Corp.*, 231 A.2d 258, 262 (Del. 1967) (citing *Unora v. Glen Alden Coal Co.*, 104 A.2d 104, 107 (Pa. 1954)).

Under the displaced worker doctrine the burden falls on the Employer seeking to demonstrate the cessation of total disability to prove the availability of work to a claimant within that claimant's physical restrictions. Once the Employer has done so, consideration must be give to whether that claimant's degree of physical impairment and the vocational considerations set forth above, demonstrate the claimant to be *prima facie* displaced. If the claimant is not found to be *prima facie* displaced, then the burden shifts to

the claimant to show that he has conducted a reasonable job search to find employment that failed due to his work injury. It is this aspect of the displaced worker doctrine to which Mr. Crump objects. Given that the Board concluded that Mr. Crump did prove to its satisfaction that he had conducted a reasonable job search that failed because of his work injury, the burden then shifted back to the Employer to show work available to Mr. Crump notwithstanding his failed job search. *Franklin Fabricators v. Irwin*, 306 A.2d 734, 737 (Del. 1973).

The Superior Court considered the question that Mr. Crump presents to this Court as to whether his burden of demonstrating that he conducted a reasonable job search that failed due to his work injury runs afoul of either the ADA or DHPEPA. The court found no conflict between the displaced worker doctrine and the federal and state anti-discrimination statutes. The court based its ruling upon its prior decision in *Keeler v. Metal Masters*, C.A. No. 97A-06-002, Terry, J. (Del. Super. Dec. 31, 1997), *aff'd*, 712 A.2d 1004 (Del. 1998) in which the identical question had previously been presented.

In *Keeler*, the court was presented with the argument that the displaced worker doctrine had been "rendered unreasonable, arbitrary, capricious and violative of the substantial due process", by virtue of its violation of the ADA and DHPEPA. As in the case at bar, the claimant in *Keeler* argued that he could not meet his burden of proof that his job search failed due to his industrial accident without implication of the ADA or the DHPEPA.

Following a lengthy analysis of the interaction between the state and federal anti-discrimination statutes, the *Keeler*

court rejected this contention. The court concluded that these statutes do not impede upon the ability of a worker's compensation claimant to demonstrate to the satisfaction of the Industrial Accident Board that he conducted a reasonable job search that failed because of his work related injury. With respect to the state statute the court concluded that 19 Del. C. § 724(e)(1) specifically authorizes "any employer to identify that applicant's self as handicapped in order to act affirmatively on that applicant's behalf." What the state statute in fact forbids is not the asking of whether the prospective employee is handicapped *per se*. Rather, the state statute forbids this inquiry for an improper purpose; namely, as a condition precedent for extension of an offer of employment. *Keeler*, slip op. at 5.

The *Keeler* court concluded that the displaced worker doctrine likewise does not conflict with the ADA, in that a claimant can meet his burden of proving that he has conducted a reasonable job search that failed because of the work related injury without surrendering the protections afforded by the ADA. Indeed, in the case before the Court, the state Industrial Accident Board **did** conclude that Mr. Crump had conducted a reasonable job search that failed because of his industrial accident. The Board did so notwithstanding its concerns with regard to the sincerity of Mr. Crump's effort. Thus, Mr. Crump's contention that the provisions of the ADA prevent him from satisfying his burden of proof in that, thereby warranting review by this Court, is belied by the specific findings of the Board.

Additionally, as the *Keeler* court noted, the displaced worker doctrine does not compel a claimant to surrender the protections of the ADA. Under the displaced worker doctrine a claimant need not prove that he conducted a reasonable

job search that failed because of the work accident "only by presenting evidence that perspective employers have said that they did not hire claimant because of his handicap." *Keeler*, slip op. at 5 (quoting *Schmitt v. Cecil Vault*, C.A. No. 82A-NO-12, Bifferato, J. (Del. Super., Aug. 17, 1983)). The court noted that, if a claimant makes effort to locate employment and those efforts fail, it is reasonable to infer that those efforts failed because there is no market for services that the claimant may perform within the physical restrictions which were the result of his work injury. Thus, Mr. Crump has this avenue available to him to demonstrate that he made efforts to find employment that failed due to the work accident without disclosing his specific restrictions.

Moreover, the only positions for which a claimant would be applying during the course of his job search are those positions that are within his physical limitations. Therefore, the presence of this physical handicap would not bar the claimant from obtaining a position within his physical restrictions as a modified duty position, by very definition, is one that is within the physical abilities of the claimant. Therefore, his work injury standing alone would have no impact on his ability to obtain a modified duty position. Because a modified duty position would not require the claimant to perform work beyond that for which he is not physically qualified the injury *per se* would not be an impediment to the injured worker's ability to obtain modified duty work. If modified work is available such as sedentary work, it would be unnecessary for an injured worker like Mr. Crump to disclose his restrictions such as his ability to lift and carry. Under those circumstances, it would be irrelevant.

The displaced worker doctrine does not test whether positions within the claimant's physical restrictions exist. Indeed, if such positions did not exist, that claimant would be totally disabled by virtue of his physical inability to work, without implication of the displaced worker doctrine. Rather, the stated purpose of the displaced worker doctrine is to ensure that the injured worker is in fact qualified to perform the types of positions that fall within his physical qualifications in light of his vocational and educational background.

For example, if a claimant has a sixth grade education, is over sixty years of age and his sole work history is forty years of construction labor, the fact that he can physically perform sedentary work does not mean that he is qualified for sedentary work. Therefore, if that claimant looked for sedentary work and did not find it, it would be presumed that the reason he could not find sedentary work was because he is not qualified for such positions. By contrast, a claimant with comparable restrictions but who is twenty-five years of age and possesses a college degree may well be easily able to find sedentary work because he possesses qualifications that the seasoned construction worker lacks.

In both examples sedentary work for which the respective claimant is physically qualified is available generally within the labor market. The claimant would seek and apply for such positions in the same manner as would *any* applicant whose injuries did *not* arise from a work related accident. Thus, the determinative factor under the displaced worker doctrine is not whether the injured worker is physically qualified for modified duty positions; but rather whether the injured worker possesses the qualifications needed to secure the types of positions for which the injured

worker is physically qualified. The displaced worker doctrine places no more burden upon an injured worker seeking reemployment within his restrictions than any similarly situated injured person would face. In both cases, it would be unnecessary for the injured worker to disclose his restrictions. Accordingly, the displaced worker doctrine does not compel an injured worker to surrender the protections of the ADA.

CONCLUSION

For the above-stated reasons, the Employer requests that this Honorable Court deny the requested Petition for Writ of Certiorari to the Supreme Court of Delaware.

Respectfully submitted,

H. GARRETT BAKER
Counsel of Record
ELZUFON & AUSTIN, P.A.
Attorneys for Respondent
1201 N. Market Street
Suite 1401
P.O. Box 1630
Wilmington, Delaware 19899
(302) 428-3181